BHLB Trustee Bhd & Anor v HSBC (M) Trustee Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S6–23–84 OF 2004
ABDUL MALIK ISHAK J
26 JANUARY 2006

Civil Procedure — Striking out — Statement of claim — Whether plaintiffs have failed to disclose material facts in their pleadings — Whether plaintiff pleaded malice on the part of the third defendant — Rules of the High Court 1980 O 18 r 19

Tort — Defamation — Libel — Plaintiffs' alleged first defendant had falsely and maliciously issued letter to the Association of Trust Companies Malaysia — Whether third defendant wrote the first defendant's letter in the course of her employment and in her capacity as the managing director of the first defendant — Whether the first defendant's letter carried a defamatory meaning by way of an innuendo

This was the third defendant's appeal against the order of the learned Deputy Registrar whereby the latter dismissed the third defendant's application to strike out the plaintiffs' statement of claim under O 18 r 19 of the Rules of the High Court 1980. The third defendant is the appellant and she is also the managing director and an employee of the first defendant, HSBC (Malaysia) Trustee Berhad. The second defendant is a public limited liability company by the name of HSBC Bank Malaysia Berhad. The first plaintiff is a registered limited liability trust company while the second plaintiff is the chief executive officer of the first plaintiff. The first plaintiff and the first defendant are members of an association known as the Association of Trust Companies Malaysia ('ATCM'). The plaintiffs' claim hinged on a letter issued by the first defendant to the ATCM ('the first defendant's letter to the ATCM'). The plaintiffs' alleged that the first defendant had falsely and maliciously issued the first defendant's letter to the ATCM. This letter was signed by the third defendant in her capacity as the managing director of the first defendant. The plaintiffs' claim alleged that the plaintiffs were libelled because the natural and ordinary meaning of the first defendant's letter to the ATCM carried defamatory imputations of the plaintiffs generally. In the alternative, the plaintiffs averred that the first defendant's letter carried a defamatory meaning by way of an innuendo.

Held, allowing the appeal:

(1) The plaintiffs had failed to disclose the material facts in their pleadings that ATCM duly responded to the first defendant's queries as set out in the first defendant's letter to the ATCM; and that the ATCM's response contained the specific responses to the queries set out in the first defendant's letter to the ATCM; and that the ATCM's response did not suggest that there was anything

untoward or improper in respect of the issuance of the first defendant's letter to the ATCM or the contents thereof (see para 8). The failure on the part of the plaintiffs to plead those material facts must be held against them (see para 10).

(2) There was not a single averment in the plaintiffs' claim which suggested or in anyway suggested that the third defendant authored the first defendant's letter to the ATCM in anything other than in her capacity as the managing director. All the relevant averments in the plaintiffs' claim showed that the third defendant wrote the first defendant's letter in the course of her employment and in her capacity as the managing director of the first defendant. The plaintiffs admitted on affidavit that the first defendant's letter was written by the third defendant both in her capacity as the managing director of the first defendant and as an employee of the first defendant. The law is clear in that no cause of action in defamation would lie against an employee or a managing director of a corporation in respect of a publication issued by a corporation (see para 12).

(3) The plaintiffs have not pleaded malice on the part of the third defendant (see para 19). In the absence of any allegation of malice, the plaintiffs have failed to set out a crucial element of a cause of action against the third defendant (see para 21).

(4) The ATCM's response clearly indicated that the first defendant did have a legitimate right or interest as a member of the ATCM to make the queries contained in the first defendant's letter to the ATCM. The plaintiffs were aware of the ATCM's response and yet they proceeded to file these proceedings without disclosing it. The plaintiffs too have failed to give any reasonable explanation for omitting to plead the ATCM's response. There was no legitimate basis or explanation for the plaintiffs to file a claim against the third defendant (see para 22).

(5) Prior to the filing of the proceedings the plaintiffs had through their solicitors issued a pre-action letter of demand against the first defendant seeking, inter alia, an apology and compensation arising from the publication of the first defendant's letter to the ATCM. None of the matters in the pre-action demand against the first defendant and the second defendant related to the third defendant. No allegation or complaint was levelled against the third defendant. No pre-action letter of demand similar to the ones that were sent to the first and second defendants was ever issued by the plaintiffs against the third defendant in her personal capacity (see para 23).

[Bahasa Malaysia summary

Ini adalah rayuan defendan ketiga terhadap perintah Timbalan Pendaftar yang bijaksana di mana beliau telah menolak permohonan defendan ketiga untuk membatalkan penyataan tuntutan plaintif-plaintif di bawah A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980. Defendan ketiga merupakan perayu dan beliau juga pengarah urusan dan pekerja defendan pertama, HSBC (Malaysia) Trustee Berhad. Defendan kedua adalah syarikat liabiliti terhad awam yang dikenali sebagai HSBC Bank Malaysia Berhad. Plaintif pertama merupakan sebuah syarikat

liabiliti amanah terhad yang berdaftar manakala plaintif kedua adalah ketua pegawai eksekutif plaintif pertama. Plaintif pertama dan defendan pertama merupakan ahli-ahli sebuah persatuan dikenali sebagai Persatuan Syarikat Amanah Malaysia ('PSAM'). Tuntutan plaintif-plaintif adalah berkisarkan sepucuk surat yang dikeluarkan oleh defendan pertama kepada PSAM ('surat defendan pertama kepada PSAM'). Plaintif-plaintif mengatakan bahawa defendan pertama telah secara menipu dan berniat jahat mengeluarkan surat defendan pertama kepada PSAM. Surat ini telah ditandatangani oleh defendan ketiga dalam kapasitinya sebagai pengurus urusan kepada defendan pertama. Tuntutan plaintif-plaintif mengatakan bahawa plaintif-plaintif telah difitnah secara bertulis kerana maksud semulajadi dan biasa surat defendan pertama kepada PSAM membawa maksud memfitnah plaintif-plaintif secara amnya. Secara alternatifnya, plaintif-plaintif menegaskan bahawa surat defendan pertama membawa maksud berunsur fitnah yang tersirat.

Diputuskan, membenarkan rayuan tersebut:

(1) Plaintif-plaintif gagal untuk mengemukakan fakta-fakta material dalam pliding mereka bahawa PSAM memberi maklum balas kepada persoalan defendan pertama sebagaimana yang dinyatakan dalam surat defendan pertama kepada PSAM; dan bahawa jawapan PSAM mengandungi jawapan yang spesifik kepada persoalan yang dinyatakan dalam surat defendan pertama kepada PSAM; dan bahawa jawapan PSAM itu tidak mencadangkan apa-apa yang tidak betul atau sesuai terhadap pengeluaran surat defendan pertama kepada PSAM atau kandungannya (lihat perenggan 8). Kegagalan di pihak plaintif-plaintif mengemukakan fakta-fakta material tersebut hendaklah diputuskan terhadap mereka (lihat perenggan 10).

(2) Tiada sebarang penegasan dalam tuntutan plaintif-plaintif yang mencadangkan atau dalam apa cara mencadangkan bahawa defendan ketiga yang menulis surat defendan pertama kepada PSAM dalam apa cara selain dalam kapasitinya sebagai pengurus urusan. Semua penegasan yang relevan dalam tuntutan plaintif-plaintif menunjukkan bahawa defendan ketiga telah menulis surat defendan pertama semasa bekerja dan dalam kapasitinya sebagai pengurus urusan kepada defendan pertama. Plaintif-plaintif mengakui atas afidavit bahawa surat defendan pertama telah ditulis oleh defendan ketiga dalam kapasitinya sebagai pengarah urusan kepada defendan pertama dan juga sebagai pekerja defendan pertama. Undang-undang adalah jelas di mana tiada kausa tindakan dalam fitnah akan terletak atas pekerja atau pengarah urusan sebuah badan korporat berhubung penerbitan yang dikeluarkan oleh bidang korporat itu (lihat perenggan 12).

(3) Plaintif-plaintif tidak memplidkan niat jahat di pihak defendan ketiga (lihat perenggan 19). Dengan ketiadaan apa-apa pengataan niat jahat itu, plaintif-plaintif telah gagal untuk menyatakan elemen penting untuk mewujudkan satu kausa tindakan terhadap defendan ketiga (lihat perenggan 21).

(4) Jawapan PSAM jelas menunjukkan bahawa defendan pertama mempunyai hak atau kepentingan di sisi undang-undang sebagai ahli PSAM untuk membuat pertanyaan yang terkandung dalam surat defendan pertama kepada PSAM.

Plaintif-plaintif sedar akan jawapan PSAM namun mereka meneruskan untuk memfailkan prosiding tanpa mendedahkannya. Plaintif-plaintif juga telah gagal untuk memberikan apa-apa penjelasan munasabah kerana tidak memplidkan jawapan PSAM. Tiada asas sah untuk plaintif-plaintif memfailkan tuntutan terhadap defendan ketiga (lihat perenggan 22).

(5) Sebelum pemfailan prosiding plaintif-plaintif telah melalui peguam mereka mengeluarkan satu surat tuntutan pra tindakan terhadap defendan pertama memohon, antara lain, maaf dan pampasan yang timbul daripada penerbitan surat defendan pertama kepada PSAM. Tiada antara perkara tersebut dalam tuntutan pra tindakan terhadap defendan pertama dan defendan kedua berkaitan dengan defendan ketiga. Tiada pengataan atau aduan wujud terhadap defendan ketiga. Tiada surat tuntutan pra tindakan yang sama dengan yang dihantar kepada defendan pertama dan kedua telah dikeluarkan oleh plaintif-plaintif terhadap defendan ketiga dalam kapasiti peribadinya (lihat perenggan 23).]

Notes

For cases on libel, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 314–434.

For cases on striking out of statement of claim, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 5959–5989.

Cases referred to

AG v BBC [1981] AC 303 (refd)

Addis v Crocker [1961] 1 QB 11; [1960] 2 All ER 629 (refd)

Anderson v Gorrie (1895) 1 QB 668 (refd)

Attwood v Chapman [1914] 3 KB 275 (refd)

Baharuddin Ali & Co v BPMB Urus Harta Sdn Bhd & Anor [2000] 4 CLJ 693 (refd)

Bottomley v Brougham [1908] 1 KB 584 (refd)

Bruce v Odhams Press Ltd [1936] 3 All ER 294 (refd)

Chatterton v Secretary of State for India (1895) 2 QB 189 (refd)

Conway v Rimmer [1968] AC 910; [1968] 1 All ER 874 (refd)

Dawkins v Lord Paulet (1869) LR 5 QB 94 (refd)

Dawkins v Lord Rokeby (1873) LR 8 QB 255 (refd)

Duncan v Cammell Laird & Co Ltd [1942] AC 624; [1942] 1 All ER 587 (refd)

Farmer v Hyde [1937] 1 KB 728; [1937] 1 All ER 773 (refd)

Fayed v Al-Tajir [1988] QB 712; (1987) 2 All ER 396 (refd)

General Medical Council v Spackman [1943] AC 627 (refd)

Goffin v Donnelly (1881) 6 QBD 307 (refd)

Hasselblad (GB) Ltd v Orbinson [1985] QB 475; [1985] 1 All ER 173 (refd)

K Surjit Kaur a/p Gean Kartar Singh v Belinda Ghoi Shuk Yee [2003] 2 MLJ 91 (refd)

Kementerian Pertahanan Malaysia & Anor v Malaysia International Shipping Corp Bhd and another suit [2003] 2 MLJ 226 (refd)

Lake v King (1670) 1 Saund 131 (refd)

Lincoln v Daniels [1962] 1 QB 237 (refd)

Lynam v Gowring (1880) 6 LR Ir 259 (refd)

M Isaacs & Sons Ltd v Cook [1925] 2 KB 391 (refd)

MP Nathan v Valaithan Raman [2003] 6 CLJ 448 (refd)

Malayan United Finance Bhd lwn Cheung Kong Plantation Sdn Bhd dan lain-lain [2000] 2 MLJ 38 (refd)
McCarey v Associated Newspapers Ltd [1964] 2 All ER 335; [1964] 1 WLR 855 (refd)
Minter v Priest [1930] AC 558 (refd)
Neill v Henderson (1901) 3 F 387 (refd)
O'Connor v Waldron [1935] AC 76 (refd)
Philipps v Philipps (1878) 4 QBD 139 (refd)
Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd [1993] 3 MLJ 16 (refd)
Riddick v Thames Board Mills Ltd [1977] QB 881; [1977] 3 All ER 677 (refd)
Rivlin v Bilainkin [1953] 1 QB 485, [1953] 1 All ER 534 (refd)
Rogers v Home Secretary [1973] AC 388; [1972] 2 All ER 1057 (refd)
Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson (1892) 1 QB 431 (refd)
Scott v Sampson (1882) 8 QBD 491 (refd)
Scott v Stansfeld (1868) LR 3 Exch 220 (refd)
Seaman v Netherclift (1876) 2 CPD 53 (refd)
Sim v Stretch [1936] 2 All ER 1237 (refd)
Slack v Barr (1918) 1 SLT 133 (refd)
Smith and National Meter Co [1945] KB 543, [1945] 2 All ER 35 (refd)
Tadd v Eastwood (1985) 1 CR 132 (refd)
Toogood v Spyring (1834) 1 Cr M & R 181 (refd)
Trapp v Mackie [1979] 1 All ER 489 (refd)
United Malayan Banking Corporation Berhad v Palm & Vegetable Oils (M) Sdn Bhd & Ors [1983] 1 MLJ 206, F.C. (refd)
Wason v Walter (1868) LR 4 QB 73 (refd)
Watson v M'Ewan (1905) AC 480 (refd)

Legislation referred to
Rules of the High Court 1980 O 18 r 19(1)(a), (b), (c), (d)

Dinesh Nair (How, Zul & Low) for the plaintiff.
Christopher KF Foo (Mark La Brooy with him) (Raja, Darryl & Loh) for the defendants.

Abdul Malik Ishak J:

INTRODUCTION

[1] This is the third defendant's appeal in encl 17 against the order of the learned deputy registrar dated 19 April 2005 whereby the latter dismissed with costs the third defendant's application in enclosure 11 to strike out the plaintiffs' Statement of Claim under the provisions of O 18 r 19 of the Rules of the High Court 1980 ('the RHC').

[2] The third defendant goes by the name of Lim Liang Hua and she is the appellant herein and she is also the managing director and an employee of the first defendant by the name of HSBC (Malaysia) Trustee Berhad. It is the third defendant

who is applying to strike out the plaintiffs' claim. The second defendant is a public limited liability company by the name of HSBC Bank Malaysia Berhad.

[3] The first plaintiff by the name of BHLB Trustee Berhad is a registered limited liability trust company while the second plaintiff by the name of Lim Yoke Long is the chief executive officer of the first plaintiff.

THE LAW

[4] The law journals are replete with authorities on the principles underlying an application under O 18 r 19 of the RHC. Suffice, for the present exercise, to state the law in the following manner:

(1) that a party may apply to strike out based on any or all the limbs of O 18 r 19(1)(a) to (1)(d) of the RHC;

(2) that the court may consider the affidavit evidence filed in respect of an application which is not solely based on limb (1)(a) of O 18 r 19 of the RHC (*Malayan United Finance Bhd lwn Cheung Kong Plantation Sdn Bhd dan lain-lain* [2000] 2 MLJ 38; and *Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16 (SC).); and

(3) what was said by the late Peh Swee Chin SCJ in *Raja Zainal Abidin bin Raja Haji Tachik* merits reproduction (see p 24 of the report):

> We must emphasise that for any court to reach such a similar decision on an application under O 18 r 19, there must, in all probability, have been an absence of conflict of material evidence or of conflict of affidavits on material points so that seemingly triable issues, seemingly difficult ones, could be readily decided in such a way as to lead to the conclusion that the action was bound to fail.

THE FACTS AS SET OUT IN THE PLAINTIFFS' STATEMENT OF CLAIM

[5] The first plaintiff and the first defendant are members of an association known as the Association of Trust Companies Malaysia ('ATCM'). The plaintiffs' claim hinged on a letter issued by the first defendant dated 5 November 2004 to the ATCM ('the first defendant's letter to the ATCM'). The plaintiffs' alleged that the first defendant had falsely and maliciously issued the first defendant's letter to the ATCM. Before I proceed any further, it is ideal to reproduce the first defendant's letter to the ATCM and it is worded as follows (see exh 'LLH-2' in encl 11A):

HSBC HSBC HSBC(M)TRUSTEE BHD

2004 NOV - 5 PM 4: 21

5 November 2004

Association of Trust Companies Malaysia BY FAX

Unit A-11-7, 11th Floor, Megan Avenue 1

No 189 Jalan Tun Razak

50400 Kuala Lumpur

Mr Cheah Boon Hoe, Chairman/Pn Shahidah Hashim, Secretary

Dear Sir/Madam

ACTM Unit Trust Scheme Fees

Thank you for your letter of 3 November 2004 in respect of our trustee fee for Prudential Unit Trust Berhad.

For the same management company, we enclose the following quotes from BHLB Trustee (Treasurer of ACTM) and Bumiputra-Commerce Trustee (Secretary of ACTM) for your kind attention:-

(1) BHLB Trustee's quote by Mr Joshua Lim, CEO was 0.0375% per annum, and

(2) Bumiputra-Commerce Trustee's quote by Puan Hjh Shahidah, General Manager was 0.04% per month for first 3 financial years and 0.045% per month thereafter.

Please let us know if a similar letter from ACTM has been sent to BHLB Trustee and Bumiputra-Commerce Trustee respectively before we respond to your letter.

Yours faithfully

sgd

Lim Hiang Hua

Managing Director

c.c. All members of ACTM (By Fax Only)

HSBC(Malaysia) Trustee Berhad

(Company No. 001281-T)

Level 1 Annexe, Menara Milenium, Jalan Damanlela

Pusat Bandar Damansara, Damansara Heights, 50490 Kuala Lumpur.

Tel: 03-2090 5999 Fax: 03-2092 1572, 2092 1576.

[6] As can be seen this very letter was signed by the third defendant in her capacity as the managing director of the first defendant. It seems that the basis of the plaintiffs' cause of action against the first and the third defendants arises out of the publication of the first defendant's letter to the ATCM. To be precise, the plaintiffs' claim alleges that the plaintiffs were libelled because the natural and ordinary meaning of the first defendant's letter to the ATCM carries defamatory imputations of the plaintiffs generally. In the alternative, the plaintiffs aver that the first defendant's letter carries a defamatory meaning by way of an innuendo. By their natural and ordinary meaning the statements may be innocuous but because of certain circumstances known to those to whom the statements were made, they may affect the plaintiffs adversely. This is what the plaintiffs are saying. The statements may be described as defamatory by innuendo. But the defences open to the defendants are certainly varied. For this exercise, I will not dwell on them in detail.

[7] Be that as it may, it is indisputable that the first defendant's letter to the ATCM sets out a query to the ATCM in respect of matters relating to the guidelines, resolutions and approaches of the ATCM in relation to the fees levied by its members such as the first plaintiff and the first defendant. It is equally indisputable that the first defendant's letter to the ATCM was published only to the other members of the ATCM with no external publication or circulation. No where in the plaintiffs' claim is it alleged or even suggested that a member of the ATCM, such as the first defendant, is unable to raise queries with the ATCM in respect of matters relating to the ATCM's guidelines and resolutions concerning its members.

THE PLAINTIFFS' FAILURE TO PLEAD AND DISCLOSE THE ATCM'S RESPONSE TO THE FIRST DEFENDANT'S LETTER TO THE ATCM

[8] It is quite obvious that the plaintiffs have failed to disclose the following material facts in their pleadings (*Bruce v Odhams Press Ltd* [1936] 3 All ER 294):

(1) that ATCM duly responded to the first defendant's queries as set out in the first defendant's letter to the ATCM and the ATCM's letter dated 10 November 2004 ('the ATCM's response') can be seen at exh 'LLH-4' of encl 11A);

(2) that the ATCM's response contains the specific responses to the queries set out in the first defendant's letter to the ATCM concerning the minimum guidelines on trustee fees and a response stating that no letter seeking clarification from the first plaintiff was ever issued; and

(3) that the ATCM's response does not suggest that there was anything untoward or improper in respect of the issuance of the first defendant's letter to the ATCM or the contents thereof.

[9] The ATCM's response was issued and copied to members of the ATCM, including the first plaintiff, a month before the filing of the writ and the statement of claim herein and the plaintiffs have not denied receiving the ATCM's response. For brevity, I must now reproduce the ATCM's response (see exh 'LLH-4' of encl 11A):

ATCM

Association of Trust Companies Malaysia

10 November 2004 IMMEDIATE ATTENTION

By Fax No: 2092-5999

and / by AR Registered

HSBC(M) Trustee Berhad

6th Floor Wisma Maran

28 Medan Pasar

50050 Kuala Lumpur

Attention: Ms Lim Liang Hua

Dear Sirs,

Minimum Trustee Fee On Unit Trust Scheme Written Clarification

We refer to your letter dated 5th November 2004 and the attachment referred therein with regard to the above subject matter.

Please be informed that ATCM did not provide any guideline to regulate minimum trustee fee on cash management funds and custodian services in relation to assets in trust accounts pursuant to section 47C(10)(d) of the Securities Industry Act 1983.

Please enclosed herewith the minutes of ATCM dated 04/06/2002, 27/06/2002, 25/07/2002 and 26/07/2002 for your reference.

Notwithstanding the above, we took cognizance of your queries in the aforesaid letter and hereby wish to advise that ATCM did not send a similar letter, seeking for clarification from Bumiputra-Commerce Trustee Berhad and BHLB Trustee Berhad for there is no issue arising on minimum trustee fees on Unit Trust Scheme after having perused the content and subject matter of the letters referred thereto in your letter.

In view of the above we would appreciate your good office would on soonest possible furnish no later than 17/11/04, a written explanation on the alleged breach set out therein our letter to your good office dated 03/11/04.

Thank you.

Yours truly,

sgd sgd

Cheah Boon Hoe Shahidah Hashim

Chairman Secretary

c.c: All ATCM Members (by Fax Only).

[10] It is the contention of the third defendant that the publication of the first defendant's letter to the ATCM was privileged in that it involved the raising of queries by a member of the ATCM of matters of which the ATCM and its members have a direct interest. In the context of this case, it relates to the guidelines, resolutions and approaches of the ATCM in relation to the fees levied by its members. It can readily be surmised that the ATCM's response wherein the plaintiffs have failed to disclose and plead supports the contention that the first defendant's letter to the ATCM was published on an occasion of privilege. The failure on the part of the plaintiffs to plead those material facts must be held against them. According to Cotton LJ in *Philipps v Philipps* (1878) 4 QBD 139 'that it is absolutely essential that the pleading, not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard, and tell them what they have to meet when the case comes on for trial.' And according to Scott LJ in *Bruce v Odhams* if any one 'material' statement is omitted, the Statement of Claim is bad. Brett LJ in *Philipps v Philipps* observed that:

> If parties were held strictly to their pleadings under the present system, they ought not to be allowed to prove at the trial any fact which is not stated in the pleadings.

A THE PLAINTIFFS' CLAIM DISCLOSES NO CAUSE OF ACTION AGAINST THE THIRD DEFENDANT

[11] Quite apart from the issue in regard to the plaintiffs' failure to disclose and plead the ATCM's response, the plaintiffs themselves aver that the third defendant B wrote the first defendant's letter to the ATCM in her capacity as the managing director of the first defendant. It is a common ground that the third defendant is not a member of the ATCM and has no personal or other interest in the affairs of the ATCM save in her capacity as the managing director of the first defendant. The plaintiffs have never suggested let alone pleaded that the third defendant issued and published the first defendant's letter to the ATCM in her personal capacity. C It must be borne in mind that the issuance of the first defendant's letter to the ATCM fell under the sole purview of the third defendant because she is the current and was, at the material time, the managing director of the first defendant. In fact, nothing in the plaintiffs' claim suggests otherwise.

D **[12]** There is not a single averment in the plaintiffs claim which suggests or in anyway suggests that the third defendant authored the first defendant's letter to the ATCM in anything other than in her capacity as the managing director. All the relevant averments in the plaintiffs' claim show that the third defendant wrote the first defendant's letter in the course of her employment and in her capacity as the E managing director of the first defendant. It is rather interesting to note that the plaintiffs admit on affidavit that the first defendant's letter was written by the third defendant both in her capacity as the managing director of the first defendant and as an employee of the first defendant. The law is clear in that no cause of action in defamation would lie against an employee or a managing director of a corporation in respect of a publication issued by a corporation (*Baharuddin Ali & Co v BPMB Urus* F *Harta Sdn Bhd & Anor* [2000] 4 CLJ 693; and *MP Nathan v Valaithan Raman* [2003] 6 CLJ 448).

[13] It is rather difficult to define the meaning of the word 'defamation.' It is a daunting task. What may be defamatory a hundred years ago may not be defamatory G today. No definition can be said to be all embracing and faultless. From the authorities, it is said that libel is defamation in a permanent and visible form. Slander, on the other hand, is said to be defamation by way of spoken words and it may include disparaging gestures or actions. Speaking generally, defamation may be defined in this way:

H (a) according to *Fraser on Libel and Slander* (7th Ed) at p 3, it is a statement concerning any person which exposes him to hatred, ridicule, or contempt, or which causes him to be shunned or avoided, or which has a tendency to injure him in his office, profession or trade;

(b) according to *Scott v Sampson* (1882) 8 QBD 491, it is a false statement about I a man to his discredit; and

(c) Lord Atkin in *Sim v Stretch* [1936] 2 All ER 1237 at p 1240 posed this pertinent question in an attempt to define the word 'defamation': would the words tend to lower the plaintiff in the estimation of right thinking members of society generally?

[14] The time honoured words like 'hatred, ridicule or contempt' occur, time and again, in many judgments of other learned Judges before me. They are still quite appropriate although they are far from being comprehensive.

MALICE IS ALLEGED AS AGAINST THE FIRST DEFENDANT AND NOT THE THIRD DEFENDANT

[15] Thus far, the evidence shows that the first defendant's letter to the ATCM was published on a privileged occasion. Legally speaking, the defence of absolute privilege is a complete bar to an action for defamation. This is so notwithstanding how false or malicious the words complained of may be. The defence of absolute privilege is different from that of qualified privilege. Absolute privilege cannot be destroyed or watered down by malice. Examples of absolute privilege may be stated as follows:

(1) Parliamentary privilege — statements made in the course of parliamentary proceedings by the Members of Parliament.

(2) Judicial privilege — statements made in the course of judicial proceedings which include certain communications passing between the legal advisers and their clients.

(3) Official privilege — this covers statements made in the course of state proceedings.

(4) Statutory privilege — this covers statements of other public officials which are protected by statute.

(5) Reports of Parliamentary proceedings in whatever forms.

(6) Newspaper reports of judicial proceedings.

(7) The question of public policy — it bestows immunity from suit upon a defamatory publication.

[16] All these examples are gathered from reading the following authorities:

(a) *Goffin v Donnelly* (1881) 6 QBD 307;

(b) *Wason v Walter* (1868) LR 4 QB 73;

(c) *Lake v King* (1670) 1 Saund 131;

(d) *Rivlin v Bilainkin* [1953] 1 QB 485, [1953] 1 All ER 534;

(e) *Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson* (1892) 1 QB 431 at p 451, (CA);

(f) *AG v BBC* [1981] AC 303 at pp 359–360, [1980] 3 All ER 161 at pp 181–182 (HL);

(g) *O'Connor v Waldron* [1935] AC 76 at p 81 (PC);

(h) *Attwood v Chapman* [1914] 3 KB 275;

(i) *Smith and National Meter Co* [1945] KB 543, [1945] 2 All ER 35;

(j) *Tadd v Eastwood* (1985) 1 CR 132 (CA);

(k) *Trapp v Mackie* [1979] 1 All ER 489 at p 492, [1979] 1 WLR 377 at p 379;

(l) *Lincoln v Daniels* [1962] 1 QB 237 at p 253, [1961] 3 All ER 740 at p 746;

(m) *Bottomley v Brougham* [1908] 1 KB 584;

(n) *Dawkins v Lord Rokeby* (1873) LR 8 QB 255, affirmed vide (1875) LR 7 HL 744;

(o) *General Medical Council v Spackman* [1943] AC 627, [1943] 2 All ER 377;

(p) *Lincoln v Daniels* [1962] 1 QB 237, [1961] 3 All ER 740 (CA).;

(q) *Addis v Crocker* [1961] 1 QB 11, [1960] 2 All ER 629 (CA);

(r) *Trapp v Mackie* [1979] 1 All ER 489, [1979] 1 WLR 377 (HL);

(s) *Neill v Henderson* (1901) 3 F 387;

(t) *Slack v Barr* (1918) 1 SLT 133;

(u) *Scott v Stansfeld* (1868) LR 3 Exch 220;

(v) *Anderson v Gorrie* (1895) 1 QB 668 at p 671 (CA);

(w) *Watson v M'Ewan* (1905) AC 480 (HL);

(x) *Seaman v Netherclift* (1876) 2 CPD 53 at p 57 (CA);

(y) *Lynam v Gowring* (1880) 6 LR Ir 259; and

(z) *Minter v Priest* [1930] AC 558 (HL).

It is also recommended to read the following authorities:

(1) *Chatterton v Secretary of State for India* (1895) 2 QB 189 (CA);

(2) *M Isaacs & Sons Ltd v Cook* [1925] 2 KB 391;

(3) *Fayed v Al-Tajir* [1988] QB 712; (1987) 2 All ER 396 (CA);

(4) *Duncan v Cammell Laird & Co Ltd* [1942] AC 624; [1942] 1 All ER 587 (HL);

(5) *Conway v Rimmer* [1968] AC 910; [1968] 1 All ER 874 (HL);

(6) *Dawkins v Lord Paulet* (1869) LR 5 QB 94;

(7) *McCarey v Associated Newspapers Ltd* [1964] 2 All ER 335; [1964] 1 WLR 855;

(8) *Farmer v Hyde* [1937] 1 KB 728; [1937] 1 All ER 773 (CA);

(9) *Rogers v Home Secretary* [1973] AC 388; [1972] 2 All ER 1057 (HL);

(10) *Riddick v Thames Board Mills Ltd* [1977] QB 881; [1977] 3 All ER 677 (CA);

(11) *Hasselblad (GB) Ltd v Orbinson* [1985] QB 475; [1985] 1 All ER 173 (CA); and

(12) *Conerey v Jacklin* (1985) Crim LR 234 (CA).

[17] In regard to qualified privilege, an action will not succeed unless the plaintiffs can prove that in publishing the words complained of the third defendant was actuated by express malice and this would include out of spite or ill-will or some other wrong or improper motive.

[18] Malice would defeat the defence of qualified privilege. Malice is totally and wholly irrelevant to absolute privilege. The defences of qualified privilege and absolute privilege exist not for the purpose of licensing the defamer to defame but rather they are "for the common convenience and welfare of society". (*Toogood v Spyring* (1834) 1 Cr M & R 181 at 193, per Parke B).

[19] Now, it is indisputable that the first defendant as a member of the ATCM has an interest in the matters raised in the first defendant's letter to the ATCM. Likewise, it is equally indisputable that the ATCM and its members have a corresponding interest in the same matter (*K Surjit Kaur a/p Gean Kartar Singh v Belinda Ghoi Shuk Yee* [2003] 2 MLJ 91). As I said, in law, the plaintiffs in a defamation claim can overcome publication on an occasion of privilege by proving that the relevant publication was actuated by malice. The only malice alluded to in the plaintiffs claim herein is that of the first defendant. Sadly, the plaintiffs have not pleaded malice on the part of the third defendant. In a desperate attempt and following the filing of the third defendant's application in encl 11, the plaintiffs have included an averment in the plaintiffs' affidavit suggesting that the third defendant had maliciously published the first defendant's letter. Such an averment is completely absent from the pleadings and it is trite law that the plaintiffs here must plead all the material facts and that any defect or omission in the statement of claim cannot be subsequently made good by affidavit evidence (*United Malayan Banking Corporation Berhad v Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1983] 1 MLJ 206, F.C.; and *Kementerian Pertahanan Malaysia & Anor v Malaysia International Shipping Corp Bhd and another suit* [2003] 2 MLJ 226). Suffice for me to say that there is nothing in the plaintiffs' claim which suggests that the third defendant will not be able to successfully rely on the defence of privilege in relation to the first defendant's letter to the ATCM.

[20] Having heard the submissions of the plaintiffs' counsel, I must say that the plaintiffs' counsel submissions characterise the issue of the plaintiffs' failure to allege malice in the pleadings as being petty, technical and inconsequential. With respect, the plaintiffs' counsel are either deliberately obfuscating the issue of malice or have missed the point entirely. The relevance of the plaintiffs' failure to allege malice against the third defendant can best be understood when the plaintiffs' claim and the plaintiffs' evidence are seen in totality. Everything must be viewed in its correct perspective and the following pertinent matters ought to be considered:

(a) that the plaintiffs' pleadings consistently maintain that the third defendant had acted merely as the representative and an employee of the first defendant;

(b) that the plaintiffs' own evidence reinforces their pleadings on point (a);

(c) that there is nothing in the pleadings to suggest that the third defendant had acted maliciously in her personal capacity or had any ulterior or other motive in issuing the first defendant's letter to the ATCM; and

(d) that the plaintiffs' claim does not contain any averment nor make any suggestion that the third defendant had acted as an independent tort feasor.

[21] In my judgment, in the absence of any allegation of malice, the case against the third defendant based on the plaintiffs' claim is this. That the third defendant was merely the passive conduit pipe through which the first defendant, being an artificial entity, had issued that controversial letter dated 5 November 2004 — referring to the first defendant's letter to the ATCM. It must be borne in mind that the parties are bound by their pleadings and that the tort of defamation requires a special treatment in so far as drafting the statement of claim is concerned. In my judgment, in failing to allege malice in the statement of claim against the third defendant, the plaintiffs have failed to set out a crucial element of a cause of action against the third defendant. I have said in *Baharuddin Ali & Co v BPMB Urus Setia Sdn Bhd & Anor* at p 698, which must surely apply in adjudicating encl 17, that:

> ….. the pleadings must be shaped and fashioned in the context of the experience and familiarity with the law on the part of the draftsmen. Inefficient preparation of pleadings would invariably result in dire consequences.

THE PLAINTIFFS' CLAIM IS FRIVOLOUS, VEXATIOUS AND AN ABUSE OF THE PROCESS OF THE COURT IN RELATION TO THE THIRD DEFENDANT

[22] The ATCM's response clearly indicates that the first defendant did have a legitimate right or interest as a member of the ATCM to make the queries contained in the first defendant's letter to the ATCM. The plaintiffs were aware of the ATCM's response and yet they proceeded to file these proceedings without disclosing it. The plaintiffs too have failed to give any reasonable explanation for omitting to plead the ATCM's response. In my judgment, there is no legitimate basis or explanation for the plaintiffs to file a claim against the third defendant (who would have a prima facie defence of privilege) and yet the plaintiffs failed to plead malice on the part of the third defendant.

NO PRE-ACTION DEMAND MADE AGAINST THE THIRD DEFENDANT

[23] Prior to the filing of the proceedings herein the plaintiffs had through their solicitors issued a pre-action letter of demand against the first defendant and the second defendant seeking, inter alia, an apology and compensation of RM3m arising from the publication of the first defendant's letter to the ATCM. It is pertinent to note that none of the matters in the pre-action demand against the first defendant and the second defendant relate to the third defendant. No allegation or complaint is levelled against the third defendant. There is simply no mention or reference to the third defendant at all. It is interesting to note that no pre-action letter of demand similar to the ones that were sent to the first and second defendants was ever issued by the plaintiffs or the plaintiffs' solicitors against the third defendant in her personal capacity.

CONCLUSION

[24] For the reasons as set out in this judgment, I allow the third defendant's appeal in encl 17 with costs. This means that the plaintiffs' claim and action against the third defendant should be struck out forthwith.

Appeal allowed.

Reported by Peter Ling